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signed 3-10-99

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In Re:

D. RICHARD WHITE,

DEBTOR.

**CASE NO. 97-42097-7
CHAPTER 7**

BRUCE DUTY,

PLAINTIFF,

v.

ADV. NO. 97-7118

D. RICHARD WHITE,

DEFENDANT.

ORDER DENYING MOTION FOR RECONSIDERATION

This proceeding is before the Court on the defendant-debtor's motion for reconsideration of the Court's order granting the plaintiff a partial summary judgment and directing the parties to confer about the amount of the judgment that should be entered. The plaintiff objects that the motion is untimely, and should be denied for that reason. The defendant-debtor, an attorney, appears pro se. The plaintiff appears by counsel Keith Kocher of Shaw, Hergenreter, Quarnstrom & Kocher, LLP, of Topeka, Kansas. The Court has considered the relevant materials and is now ready to rule.

On the plaintiff's motion for summary judgment, the Court determined that the debtor's obligation to him was nondischargeable pursuant to 11 U.S.C.A. §523(a)(4) because it arose from the debtor's defalcation while acting in a fiduciary capacity. However, lacking sufficient information to

determine the size of this debt, the Court directed the parties to discuss that question and see if they could agree on an amount. This decision was filed on February 3, 1999. Thirteen days later, the debtor filed his motion to reconsider, stating no basis for the Court to reconsider its order, but indicating a memorandum in support of the motion would be submitted “in the near future.” On March 1, the debtor filed the promised memorandum. The plaintiff has filed a motion to strike the debtor’s motion as untimely, and asking for more time to respond if his motion to strike is denied. The plaintiff’s motion is premised on the view that the Court’s decision was a final, appealable order. The Court believes the decision was not a final order, however, because the amount of the debtor’s obligation to the plaintiff was left unresolved. The debtor’s motion is not untimely, and the Court can resolve it on its merits without waiting for the plaintiff’s response.

DISCUSSION AND CONCLUSIONS

The debtor raises three issues in his motion: (1) the fiduciary relationship required to bring his debt to the plaintiff under 11 U.S.C.A. §523(a)(4) has not been established; (2) no failure to account for funds entrusted to him has been established; and (3) no defalcation has been established. The Court must reject all the debtor’s arguments.

The debtor correctly asserts, as the Court stated in its decision, that the attorney-client relationship alone does not create the fiduciary relationship required under §523(a)(4). The debtor has conceded that he agreed to act as the plaintiff’s attorney in a personal injury action. In Kansas, this admitted attorney-client relationship made the Kansas Model Rules of Professional Conduct (“MRPC”), 1997 *Kan. Ct. R. Annot.* 262-390, applicable to the debtor’s dealings with the plaintiff.

As the Court explained in its decision, Rule 1.15 of the MRPC, *1997 Kan. Ct. R. Annot. 316-17*, provides that any money that an attorney receives on behalf of a client as a result of the attorney-client relationship is held in trust for the client and must be deposited into a trust account. The debtor concedes that he did receive money on behalf of the plaintiff from settlements of the personal injury action and that he placed the money in his trust account as required by MRPC 1.15. It is the combination of the attorney-client relationship, MRPC 1.15, and the debtor's receipt of money on behalf of the plaintiff, not the attorney-client relationship alone, that created the fiduciary relationship required to make §523(a)(4) applicable.

The debtor next argues that he did account for the money he received for the plaintiff because he told him what he did with the money. This argument is based on a misunderstanding of the decision in *Antlers Roof-Truss & Builders Supply v. Storie (In re Storie)*, 216 B.R. 283, 286-90 (10th Cir. BAP 1997). The court said, "We conclude that 'defalcation' under section 523(a)(4) is a fiduciary-debtor's failure to account for funds that have been entrusted to it due to any breach of fiduciary duty, whether intentional, wilful, reckless, or negligent. Furthermore, the fiduciary-debtor is charged with knowledge of the law and its duties." *Id.* at 288. The court did not mean that a fiduciary fulfills his duty to his beneficiary merely by telling the beneficiary how the fiduciary distributed money he held in trust for the beneficiary—that is, accounting for the money—but that the fiduciary's distribution of the money must have been made according to the applicable law. If the debtor did not follow the law in distributing the money, the fact he told the plaintiff how he distributed it does not protect him from liability under §523(a)(4).

Finally, the debtor asserts that his ignorance of the concept of “present value” and the Court’s failure to cite any authority that requires an attorney to calculate his fee based on the present value of a settlement he obtains for his client mean that it has not been established that he committed a “defalcation while acting in a fiduciary capacity.” The above-quoted portion of the *Storie* decision refutes the first part of this argument: if the law required him to calculate his fee based on the present value of the settlements, he was charged with that knowledge and cannot avoid responsibility by asserting he was ignorant of the requirement. The question then becomes whether the law required him to use present value in determining his fee.

The concept of “present value” merely recognizes the financial reality that the receipt of \$1 today is worth slightly more than the receipt of \$1 tomorrow or the next day, and significantly more than the receipt of \$1 twenty years in the future. Courts have also recognized that reality when faced with issues involving money to be received or paid in the future. For example, in a case declaring that damages under the Federal Employers’ Liability Act for the loss of future benefits must be reduced to the present value of those benefits, the United States Supreme Court long ago explained:

The damages should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased. . . . So far as a verdict is based upon the deprivation of future benefits, it will afford more than compensation if it be made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded. It is self-evident that a given sum of money in hand is worth more than the like sum of money payable in the future.

Chesapeake & Ohio R. Co. v. Kelly, 241 U.S. 485, 489 (1916); *see also St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 412 (1985) (*per curiam*) (quoting this language from *Chesapeake & Ohio v. Kelly*). The Restatement (Second) of Torts similarly declares: “The measure

of a lump-sum award for future pecuniary losses arising from a tort is the present worth of the full amount of the loss of what would have been received at the later time.” *Restatement (Second) of Torts*, §913A (1977). Describing a concept that should be familiar to personal injury lawyers, Comment a to §913A explains:

If damages are awarded for losses that will be incurred in the future, it would be over-compensation to give at the present time in cash their full amount. They should be reduced to their present worth, since they are being paid in advance. This rule is a counterpart to that in Section 913, on interest. Just as interest is granted to the plaintiff for a loss between the time of the harm and the time of the trial, so is interest granted to the defendant for prepaying the loss that is yet to occur. The reduction to present worth means that this interest is being granted to the defendant.

The requirement of reduction to present worth applies to future pecuniary losses in general, but it arises most frequently with personal injuries. If earning capacity has been lost or impaired, the future losses in earnings are discounted. So also with damage awards covering future medical expenses; the payment of them at the future date will be a pecuniary loss.

Id. at §913A, cmt. a. The Kansas legislature has also recognized the present value concept, requiring its application in various statutes concerned with the value of money that will be or should have been received in the future. *See, e.g., K.S.A. 1998 Supp. 20-2621(1) (purchase of additional future retirement benefits by certain judges); K.S.A. 1998 Supp. 23-201(b) (present value of future military retirement benefits are part of marital estate created when divorce petition is filed); K.S.A. 59-2240 (demands against probate estate that are not yet due may be allowed at present value); K.S.A. 1998 Supp. 74-4919a, 74-4919g, 74-4919i, 74-4919n, 74-4919p, 74-4919q (all concerned with employees’ purchase of additional future KPERS retirement benefits); K.S.A. 84-2a-103(u) (defining “present value” for purposes of Article 2a, Leases, of the Kansas UCC); K.S.A. 84-2a-518(2), 84-2a-519(1) & (4), 84-2a-527(2), 84-2a-528(1) & (2), and 84-2a-529(1)(a) & (b) (all using present value to limit damages available to lessors and lessees for breach of*

lease provisions). As these examples show, the present value concept has been widely recognized in various legal contexts, and was implicated when the debtor was required to calculate his one-third contingent fee for settlements that paid the plaintiff \$46,000 immediately and would pay him a total of \$61,500 more over the next 23 years. Although the Court has not found a decision or statute applying the concept directly to an attorney's contingent fee contract, the Court is convinced that Kansas law required the debtor to incorporate the financial reality of "present value" into the calculation of his fee under his contract with the plaintiff. By failing to do so, he inflated his fee to more than one-third of the plaintiff's recovery, and thus committed a "defalcation" as the Tenth Circuit Bankruptcy Appellate Panel interpreted that word in *Storie* when he paid himself that excess fee from the money he held in trust for the plaintiff.

For these reasons, the Court concludes the debtor's motion to reconsider has exposed no flaws in the decision that declared his obligation to the plaintiff to be nondischargeable under 11 U.S.C.A. §523(a)(4), and must be denied. The plaintiff's motion to strike is denied, and his motion for an extension of time is denied as moot.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this ____ day of March, 1999.

JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE